Supreme Court, U.S.
FILED

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NO.

IN THE

Supreme Court of the United States

MARTIN HOOD,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 19, 2004

QUESTION PRESENTED

Rule 39(b) of the Federal Rules of Civil Procedure gives the district courts discretion to order a trial by jury despite a failure to make a timely demand under Rule 38(b) or Rule 81(c). In a long series of decisions, including this one, the United States Court of Appeals for the Ninth Circuit, and perhaps for the Second Circuit, have flatly denied district courts any discretion to order a trial by jury where the failure to make a timely demand is due solely to inadvertence. All the other courts of appeals have adopted a more flexible interpretation allowing the district courts, in this circumstance, to consider other factors, primarily inconvenience to the court or prejudice to the other party. Which of these interpretations is more consistent with the language and purpose of Rule 39(b)?

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PETITION FOR WRIT OF CERTIORARI

Martin Hood respectfully asks that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit, dated December 3, 2003, (App. A-1) is not reported. The order of the Court of Appeals denying the petition for rehearing en banc (App. A-3) is not reported. The opinion and decision of the magistrate denying the motion, under Rule 39(b), for a trial by jury (App. A-4), is not reported. The opinion and decision of the district court (App. A-6) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 2003. A timely petition for rehearing en banc was denied on January 23, 2004. (App. A-3) The jurisdiction of the Court is provided by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States states, in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Rule 81(c) of the Federal Rules of Civil Procedure provides, in relevant part, that: "These rules apply to actions removed to United States district courts from the state courts and govern procedure after removal . . . [A] party entitled to a trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served . . . [if the party is not the

petitioner] within 10 days after service on the party of the notice of filing the petition."

Rule 39(b) provides, in relevant part, that: "Issues not demanded for trial by jury as provided by Rule 38 shall be tried by the court, but notwithstanding the failure of a party to demand a jury in a action in which such a demand might have been made of right, the court, in its discretion, may order a trial by a jury of any or all issues."

The full text of these rules and of other rules cited in this petition are set forth in the Appendix B.

STATEMENT OF THE CASE

This action, for breach of an insurance contract, was filed in a state court in Hawaii on February 13, 1998. The insurer, respondent in this Court, had refused to pay a claim for damages suffered by petitioner when his house was consumed in a fire, asserting that petitioner had set the fire. The complaint named as defendants respondent and an individual who, like petitioner, was a citizen of Hawaii. When the state court entered a summary judgment dismissing the action against the individual defendant, thus creating full diversity of citizenship, respondent, on January 13, 1999, filed a notice of removal to the District Court of Hawaii. On February 19, 1999, petitioner filed an untimely demand for a trial by jury. No response was filed. No action was taken by the court.

On April 19, the court held a status conference and set a trial date of February 29, 2000, close to a year away. In fact, the trial did not start until September, 2001, almost 2-1/2 years later. The day after the status conference, respondent filed a motion to strike the demand for a trial by jury. It was heard and decided by a magistrate who refused to order a trial by jury.

The action was then tried by the court which held for the respondent. An appeal was taken, asserting only that the district court erred in holding that it had no authority to order a trial by jury. The appeal was denied. A petition for

reheating en banc filed on December 29, 2003, was denied without opinion on January 23, 2004.

REASONS FOR GRANTING THE WRIT

1. **A conflict exists among the courts of appeals.** The magistrate refused to order a trial by jury, giving as his reason—despite the language of Rule 39(b)—that "this Court has no discretion to order a jury trial under F.R.C.P. 39(b)." The Court of Appeals, although asserting that it reviewed for abuse of discretion, affirmed on the ground that "[o]ur established law precludes Hood's claim: 'An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown. *Pac. Fisheries Corp. v. HIH Casualty & Gen. Ins. Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001)' " (App. p. 1, emphasis added.)[1/]

If this action had been filed in a United States district court in the First Circuit,[2/] or in the Third Circuit,[3/] or in the Fourth Circuit,[4/] or in the Fifth Circuit,[5/] or in the Sixth Circuit,[6/] or

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[1/] The assertion that the decision below was reviewed "for abuse of discretion" is plainly mistaken. The magistrate stated that he had no discretion and, in the statement quoted above, the Court of Appeals agreed that, under the circumstances, he had none.

[2/] *Rowlett* v. *Anheuser Busch Inc.*, 832 F.2d 194, 200 (1st Cir. 1997) (broad rule that the exercise of discretion by the district court will almost never be reversed).

[3/] *S.E.C.* v. *The Infinity Group Company, et al.*, 212 F3d 180, 195-196 (3rd Cir. 2000).

[4/] *Malbon* v. *Pennsylvania Millers Mut. Ins.*, 636 F.2d 936, 940 fn. 10 (4th Cir. 1980).

[5/] *Swofford* v. *B & W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964) *cert. denied*, 379 U.S. 902 (1965) (grant of the motion is appropriate "in the absence of strong and compelling reasons to the contrary").

[6/] *Kitchen* v. *Chippewawa Valley Schools*, 825 F.2d 1004, 1013 (6th Cir. 1987) (inadvertence is a basis for denial but a jury trial should be granted "in the absence of strong and compelling reasons to the contrary").

in the Seventh Circuit,[7] or in the Eighth Circuit,[8] or in the Tenth Circuit,[9] or in the Eleventh Circuit,[10] or in the District of Columbia Circuit,[11] it is likely that the district court would have granted a request under Rule 39(b) for a jury trial. At the very least, every one of those courts would have exercised the discretion conferred upon it by Rule 39(b), and after considering all the relevant factors, made its decision. None of those courts would have been bound by a rule, imposed by its court of appeals, that where no explanation was given for a failure to make a timely demand, the court had no discretion to consider other relevant factors. To be sure, many district courts have denied motions to order a jury trial in these circumstances and their decisions have not been reversed, but district court decisions ordering a trial by jury under Rule 39(b) are rarely, if ever, reversed for abuse of discretion.

The opinions in the other courts of appeal do not speak in a single undeviating voice. It is unnecessary to explore here, at length, the several subtle distinctions among them. They plainly permit the district courts to exercise the discretion conferred by Rule 39(b) in cases where no other explanation for the untimely demand is offered other than inadvertence. The conflict between the interpretation of Rule 39(b) in the Ninth and Second Circuits and that given in the rest of the country is sharp and clear.

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[7] *Members* v. *Paige*, 140 F.3d 699, 703 (7th Cir. 1998) ("Rule 39(b) does not require litigants to surmount a hurdle such as 'excusable neglect,' it is an open-ended grant of discretion . . .".

[8] *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980) (jury trial should be "liberally granted" despite untimely demand "when no prejudice results").

[9] *Nissan Motor Corp.* v. *Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) (same rule as the 6th Circuit).

[10] *Sullivan* v. *School Bd. of Pinellas County*, 773 F.2d 1182, 1188 (11th Cir. 1985).

[11] *BCCI Holdings* v. *Khalil*, 214 F.3d 168, 170 (D.C. Cir. 2000) (district courts have "wide discretion" under rule).

If this case had been filed in a state court and removed to a district court in the Second Circuit, a request for a trial by a jury, pursuant to Rule 39(b), would almost certainly have been granted. In *Cascone* v. *Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2nd Cir. 1983) the Court of Appeals for the Second Circuit affirmed a district court decision that had ordered a trial by jury under Rule 39(b). The Court of Appeals, relying in part on an earlier decision with a complicated history, *Higgins* v. *Boeing Co.*, 526 F.2d 1004 (2nd Cir. 1975), held that in a removed action where the plaintiff's lawyer practiced primarily in the state court, and had only been admitted in the federal court for one year, the district court properly ordered a trial by jury, even though no explanation was given for the untimely request. The Court of Appeals, however, expressly refused to overrule its earlier decisions that in an action filed in the district court and where no explanation was offered for an inadvertent untimely motion, that court had no such discretion, presumably even if the lawyer was young and inexperienced.

The instant case was filed in a state court and removed, so that there is a direct conflict between the law in the Ninth Circuit and that in the Second Circuit, even though they are in agreement respecting the law governing actions filed in a federal court. The distinction made in the Second Circuit is, we believe, untenable and petitioner does not ask that this conflict be resolved. The courts in both circuits, rather, should be required to exercise the same discretion as is available to the district courts throughout the rest of the country.

Curiously, the Court of Appeals for the Ninth Circuit has never provided a rationale or explanation for its adoption of this rigid and harsh interpretation. In an early case, *Mardesich* v. *Marciel*, 538 F.2d 848 (9th Cir. 1970), the court affirmed the district court's refusal to grant a jury trial, citing a decision by the Court of Appeals for the Second Circuit,

which had earlier adopted the same rigid rule.[12] The court below has followed the same interpretation of Rule 39(b) ever since, right up to the present case, without analysis and solely on the basis of previous decisions, primarily *Mardesich*.[13]

2. **The issue is important and the Ninth Circuit's gloss on Rule 39(b) is unsound**. This case is important because it involves one of the most precious of our constitutionally protected rights.

> Maintenance of the jury, as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500, 501 (1959). For that reason, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). The right to trial by jury is a "sacred" one that "should be

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12/ *Noonan* v. *Cunard Steamship Company*, 375 F.2d 69 (2nd Cir. 1967). The support offered by the court for this decision was deeply flawed. The principal basis for the decision was that a large number of district court decisions had adopted this rigid interpretation. There are many issues of fact, the Court asserted, that a judge can resolve just as well as a jury. 375 F.2d at 72. That may be right. But the statement shows a sad misunderstanding of the significance of the right to a trial by jury in our jurisprudence, which makes that fact irrelevant so far as the Seventh Amendment right is concerned.

13/ *Chandler Supply Co.* v. *GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980); *Lewis* v. *Time Inc.*, 710 F.2d 549, 556-7 (9th Civ. 1983); *Craig* v. *Atlantic Richfield Co.*, 19 F.3d 472, 477 (9th Cir. 1999) (plaintiff mistakenly relied upon defendants' demand for jury trial); *Kletzelman* v. *Capistrano Unified School Dist.*, 91 F.3d 68,71 (9th Cir. 1996); *Pacific Fisheries Corp.* v. *HHH Cas. & Gen. Ins.*, 239 F.3d 1000, 1002 (9th Cir. 2001); *Kulas* v. *Flores*, 255 F.3d 780, 784 (9th Cir. 2001); *Zivkovic* v. *S. Cal. Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002) (no exception for *pro se* litigant).

jealously guarded by the courts." *Jacob* v. *City of New York*, 315 U.S. 752 (1942).

Rule 38(d) does declare that a failure to make a timely demand shall be treated as a waiver of the Seventh Amendment right. But that is immediately followed by the grant of discretion, in Rule 39(b), to forgive or not enforce the waiver. All the pertinent decisions of this Court suggest that this discretion should be liberally exercised. Factors such as the lack of inconvenience to the court and the absence of prejudice to the opposing party even when the party's lawyer can offer no excuse for the lapse, as most of the courts of appeals have held, are surely entitled to great, perhaps even controlling, weight. Almost all the courts of appeals have encouraged the district courts to exercise their discretion in this way.

Regrettably, it appears from the reports that there are too many motions for a jury trial under Rule 38(b) and Rule 81(c) that are filed out of time. Because of the importance of the right to a trial by jury, this Court wisely provided a different standard, when the federal rules of civil procedure were first adopted, for excusing to meet the time limit set forth in Rule 38(b) than the standard for excusing a failure to meet time limits set forth in other rules. Rule 6(b) deals generally with requests for enlargement of time where, under other rules, some action must be taken within a specified time. Where the request is made before the specified time has expired, "some cause" must be shown. Where the time has expired, enlargement is still permitted but the failure to act within the specified time must be due to "excusable neglect." Rule 6(b)(2). The rule also deprives the court of discretion to enlarge the time under certain specified rules, not including Rule 38(b). Rule 39(b), in contrast, does not speak in terms of enlargement of the time set forth in Rule 38(b). It is rather a broad grant to the district court, in its discretion, to order a jury trial at any time. That would certainly seem to call always for consideration of all the relevant facts and circumstances.

The Court of Appeals has, in effect, imported into Rule 39(b) factors such as "for cause shown" or "excusable neglect," even though this is flatly inconsistent with the plain implication of the carefully drafted language of the rules, read as a whole. Its decision is unsound.

CONCLUSION

Litigants in the large Ninth and Second Circuits should be entitled to the same, not greater, limitations upon their right to a trial by jury as those applicable to litigants in the rest of the country. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 19, 2004

APPENDIX A

[Stamped: Filed December 5, 2003]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN HOOD, Plaintiff – Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant – Appellee.	No. 02-15084 D.C. No. CV-99-00025-DAE MEMORANDUM[*]

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Submitted December 3, 2003[**]
Seattle, Washington

Before: KLEINFELD, GOULD, and TALLMAN, Circuit Judges.

Appellant Martin Hood appeals from an order of the United States District Court for the District of Hawaii granting appellee State Farm Fire and Casualty Company's motion to strike Hood's demand for a jury trial. Hood concedes that his jury demand was untimely under Rule 81 of the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 81(c). Nevertheless, Hood maintains that this rule should not be interpreted to

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36–3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

deny the district court discretion to grant Hood's jury demand where the untimeliness of the demand resulted solely from his inadvertence. We review for abuse of discretion. *Zivkovic* v. *S. Cal. Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002).

Our established law precludes Hood's claim: "An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown." *Pac. Fisheries Corp.* v. *HIH Casualty & Gen. Ins. Ltd.*, 239 F.2d 1000, 1002 (9th Cir. 2001); *see also Zivkovic*, 302 F.3d at 1086. Hood does not make any showing of cause for the untimeliness of his demand. Our panel is without authority to alter the law of this circuit, which can only be done by an en banc court. *United States* v. *Hayes*, 231 F.3d 1132, 1139-40 (9th Cir. 2000). The district court under settled precedent was required to strike Hood's untimely jury demand.

AFFIRMED.

[Stamped: Filed January 23, 2004]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN HOOD, Plaintiff – Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant – Appellee.	No. 02-15084 D.C. No. CV-99-00025-DAE District of Hawaii, Honolulu ORDER

Before: KLEINFELD, GOULD, and TALLMAN, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is DENIED.

[Stamped: Filed June 8, 1999]

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IN THE UNITED STATES COURT

FOR THE DISTRICT OF HAWAII

MARTIN HOOD, Plaintiff, vs. STATE FARM FIRE AND CASUALTY COMPANY, a/k/a STATE FARM INSURANCE COMPANIES, Defendant.	CIVIL NO. 99–00025 DAE ORDER GRANTING DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION TO STRIKE PLAINTIFF MARTIN HOOD'S DEMAND FOR TRIAL BY JURY FILED ON FEBRUARY 19, 1999, FILED ON APRIL 20, 1999 HEARING Date: May 20, 1999 Time: 10:00 a.m. Judge: Hon. Francis I. Yamashita TRIAL DATE: Feb. 29, 2000

ORDER GRANTING DEFENDANT
STATE FARM FIRE AND CASUALTY COMPANY'S
MOTION TO STRIKE PLAINTIFF MARTIN HOOD'S
DEMAND FOR TRIAL BY JURY FILED
ON FEBRUARY 19, 1999, FILED ON APRIL 20, 1999

Defendant State Farm Fire and Casualty Company's Motion to Strike Plaintiff Martin Hood's Demand for Trial by Jury Filed on February 19, 1999, Filed on April 20, 1999 having come on for hearing before the Honorable Francis I. Yamashita on May 20, 1999 at 10:00 a.m., Joseph A. Ryan, Esq. appearing for Plaintiff Martin Hood ("Plaintiff") and Lisa A. Ginoza, Esq. appearing for Defendant State Farm Fire and Casualty Company ("State Farm"), and the Court having carefully reviewed all memoranda, declarations and exhibits submitted, having heard and considered the arguments of counsel and being fully apprised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that State Farm's Motion to Strike Plaintiff Martin Hood's Demand for Trial by Jury Filed on February 19, 1999, Filed on April 20, 1999 is GRANTED. The motion is granted on the following grounds:

(1) Plaintiff's demand for trial by jury is untimely under F.R.C.P. 81(c) and therefore constitutes a waiver by Plaintiff of trial by jury; and

(2) this Court has no discretion to order a jury trial under F.R.C.P. 39(b).

DATED: Honolulu, Hawaii, June 8, 1999.

/s/ FRANCIS I. YAMASHITA
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:
/s/ JOSEPH A. RYAN, ESQ.
Attorney for Plaintiff

[Stamped: Filed November 26, 2001]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARTIN HOOD, Plaintiff, vs. STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	CIVIL NO. 99–00025 DAE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court conducted a bench trial in this action from September 19-21, 2001, October 11-12, 2001 and October 16, 2001.[1/] Paul Saccoccio, Esq., appeared on behalf of plaintiff; Mark J. Bennett, Esq., and Lisa W. Ginoza, Esq., appeared on behalf of Defendant.

BACKGROUND

On February 14, 1997, Plaintiff's residence was damaged by fire. Plaintiff was insured through Defendant State Farm Fire and Casualty Company. Following a detailed investigation, in which the Honolulu Fire Department and Defendant's fire investigator both determined that the fire was "incendiary," Defendant denied coverage for the claim.

Based on this denial of his insurance coverage, Plaintiff filed his First Amended Complaint ("the Complaint") in this case in state court on February 20, 1998. The Complaint

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[1/] The break in dates was due to scheduling conflict with certain of the parties' expert witnesses.

alleged intentional infliction of emotional distress, breach of contract, and bad faith and deceptive acts and practices. Defendant removed the case to this court.

Defendant moved for summary judgment, which this court granted in part and denied in part on September 19, 2000. Specifically, the court dismissed the claims for intentional infliction of emotional distress and bad faith, but allowed the breach of contract claim to proceed. Although the court found that Defendant had produced substantial evidence that the fire was in fact incendiary, Plaintiff had come up with one expert who stated that the cause of the fire was undetermined. This was enough to overcome a motion for summary judgment and submit the issue to the fact finder.

The matter, therefore, initially proceeded to trial on September 19, 2001. In accordance with the order of this court, Plaintiff and Defendant submitted their amended proposed findings of fact and conclusions of law on October 24, 2001. Having considered the testimony and evidence presented at trial, judging the credibility of the witnesses[2/] and the weight of evidence, and for the reasons set forth below, the court now enters the following Findings of Fact and Conclusions of Law in accordance with its obligations under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 42(c).

[2/] The following witnesses testified at trial:

1. Jeff Ball, Defendant's Claim Representative
2. Martin Hood
3. Peter Davenport, Plaintiff's neighbor
4. Ryce Reeves, passerby who initially sighted and reported the fire
5. Yukali Ohno-Davenport, Plaintiff's neighbor
6. Bill Barnfield, Plaintiff's neighbor
7. Captain Steven Johnson Honolulu Fire Department
8. Jonathan L. Shouman, Defendant's cause and origin expert
9. Captain Glenn Solem, Honolulu Fire Department
10. Rex Millard, Plaintiff's cause and origin expert

FINDINGS OF FACT

1. After reviewing relevant case law, the court determined that, under the "accidental loss" language of the policy, the initial burden to show that the fire was accidental falls on the Plaintiff. Once Plaintiff has proven that the loss was accidental, the burden shifts to Defendant to prove denial of coverage was reasonable.

2. Even if Plaintiff did not have the initial burden of proving that the fire was accidental, if Defendant proves that the policy was void, Defendant did not breach its contract with Plaintiff.

3. On February 14, 1997, a fire ("the fire") destroyed Plaintiff's residence located at 59-506 Kamehameha Highway, Haleiwa, Hawai`i 96712.

4. At the time of the fire, Plaintiff's residence was insured by Defendant under Homeowners Extra Policy No. 51-BJ-8974-6 ("the policy"), which covered any casualty that met the policy's terms. The policy was issued on January 27, 1997 and was effective for one year. *See* Joint Exhibit ("JT Ex.") 37A (copy of insurance policy). Defendant did not pay Plaintiff's claim on the grounds that Plaintiff's loss was not an accidental loss, as required by the terms of the policy. *See* Def.'s Memo in Support of Mot. For Leave to File Counterclaim for Declaratory Relief against Plaintiff ("Def.'s Jan. 20, 1999 Memo"), 3 (citing Vea Decl. at ¶7).

5. The fire started at approximately 5:10 a.m. Captain Steven Johnson ("Captain Johnson") testified that the fire was logged at the Honolulu Fire Department ("HFD") Sunset Beach Station at approximately 5:16 a.m. *See* JT Ex. 39, 021 (HFD Fire Investigation Report).

6. Captain Johnson further testified that the firefighters arrived at the scene of the fire (the scene") at approximately 5:18 a.m. and that, at their time of

arrival, Plaintiff's house was "fully involved," which meant that the fire had multiple points of origin. The fire was under control within twelve minutes of HFD's arrival, at approximately 5:28 a.m. *See* JT Ex. 39, 021 (HFD Fire Investigation Report).

7. The fire was extinguished at 6:11 a.m. *See* JT Ex. 40A, 003 (Honolulu Police Department ("HPD") report noting time of extinguishment).

8. Captain Johnson classified Plaintiff's house as a "total loss," because even though the structure was still standing, the fire had destroyed most everything and rendered the house uninhabitable.

9. Captain Johnson referred the fire at Plaintiff's residence to fire investigator and Captain of the HFD Fire Investigation Section, Captain Glenn Solem ("Captain Solem"). The physical conditions that caused Captain Johnson to refer the case to the fire investigator were (i) the distinctive burn patterns underneath the Plaintiff's house which suggest that "flammables" could have been involved; (ii) on the Sunset side of Plaintiff's house, spots of considerable burning were next to spots with little burning which seemed unnatural and suggested the use of liquid accelerants in some areas; (iii) considerable charring on the back porch was odd because the fire was apparently inside the house, making it unusual to see so much damage outside; and (iv) there appeared to be multiple origins of the fire which was suspicious because a normal fire would usually originate in one spot. *See* JT Ex. 39, 26-63 (HFD photographic report accompanying photographs that depict damage and burn patterns).

10. Captain Solem arrived at the fire scene at 6:32 a.m. *See* JT Ex. 40A (HPD report noting time of Captain Solem's arrival).

11. Plaintiff stipulated to Captain Solem's qualification as an expert witness. Captain Solem testified that when he arrived at the site, he initially assumed, as is his habit, that the fire was accidental. Only when the evidence at the site did not match the progression of a normal fire, did Captain Solem entertain the thought of a suspicious origin.

12. In conducting his investigation, Captain Solem relied upon the "systematic approach" or "process of elimination," which he said is now call the "scientific method." Specifically, this process calls for (i) recognizing the problem, (ii) collecting all data, (iii) considering, by way of the systematic approach, all the reasons how or why the fire could have occurred, (iv) eliminating all the reasons precluded by the circumstances, and finally (v) testing the remaining hypothesis. *See* JT Ex. 39, 25 (HFD Fire Investigation Report summarizing Captain Solem's conclusion based on process of elimination); *see generally* JT Ex. 39, 22-25 (HFD Fire Investigation Report summarizing Captain Solem's investigation).

13. As part of the investigation, Captain Solem also took photographs; interviewed the Plaintiff and Ryce Reeves, the initial witness of the fire; discussed the scene with Captain Johnson, the firefighters, and the City and County Electrical Inspector; and briefly reviewed Mr. Shouman's and Mr. Ball's reports.

14. After concluding his investigation, Captain Solem ruled out all accidental causes—*e.g.*, Plaintiff's smoking, electrical, or spontaneous combustion—and natural—*e.g.*, lightening—causes of the fire. Relying on the relevant factors of (2) air space, (2) heat release rate, (3) location of combustible products in the room, (4) transfer of heat and time sequence, and (5) amount of oxygen in the room, Captain Solem ultimately determined that the extensive and excessive damage

incurred at the site could not have been the result of a natural fire. Rather, Captain Solem found this to have been an incendiary fire with multiple points of origin that involved the use of an accelerant like gasoline.

15. The six samples taken by Captain Solem and HPD tested either negative or inconclusive, which means that affirmative traces of accelerant were not found, but not that there was no accelerant present.

16. On February 15, 1997, the day after the fire, Jeff Ball inspected the fire site. After walking throughout the remainder of Plaintiff's residence, taking photographs of the site, and speaking with the Plaintiff and Plaintiff's neighbors, Mr. Ball testified that he had found the circumstances of the fire "suspicious." As a result, Mr. Ball called to have the resource claims specialist in the region recommend a cause and origin specialist.

17. On February 17, 1997, Defendant hired investigator John Shouman of Fire Protection Consultants. Mr. Shouman is a fire cause and origin specialist. At trial, Plaintiff stipulated to Mr. Shouman's qualifications as an expert on the cause and origin of fires.

18. Mr. Shouman visited and investigated the fire site from February 18-20, 1997.

19. As part of his investigation, Mr. Shouman walked around the inside and outside of Plaintiff's residence, took photographs and video recordings, measured and diagramed Plaintiff's residence, made computer-generated models of Plaintiff's residence, and met with Plaintiff in order to walk through the residence with Plaintiff in an attempt to reconstruct the scene.

20. Mr. Shouman determined that much of the house had gone into flashover (a transition phase in which almost everything in the house is emitting vapors and is on fire) and even post flashover (complete destruction).

Mr. Shouman also observed unnatural burn patterns, which were elongated and contained deeper and more defined burning than the typical char. These patterns appeared to be the result of the use of an ignitable liquid.

21. Mr. Shouman took three samples from Plaintiff's residence, all of which tested negative. However, the test results state that a finding of negative does not preclude the presence of flammable or combustible liquids at the fire scene. Thus, Mr. Shouman testified that the test results were "inconclusive" for the presence of ignitable liquids, because the results did not preclude a particular cause and origin finding. The court finds based on testimony it finds wholly credible that all traces of ignitable liquids may have been destroyed and/or eliminated in such a very hot and fast fire, rendering it impossible for any laboratory tests to turn up positive despite the original use of an accelerant.

22. Mr. Shouman determined that this was a "suspicious" or "incendiary" fire. *See* JT Ex. 11, 25 ¶¶21-24. In making this determination, Mr. Shouman used a systematic, scientific approach, relying on the process of elimination. First, Mr. Shouman found no evidence that electrical wire contributed to the start of the fire. Second, Mr. Shouman eliminated all heat-producing devices as the cause the fire, including the lamp Plaintiff said might have caused the fire. Third, Mr. Shouman eliminated spontaneous combustion as a possible cause. Fourth, Plaintiff told Mr. Shouman that he might have smoked a cigarette before going to bed. Nonetheless, Mr. Shouman was able to dismiss this cigarette as the cause, because a cigarette left smoldering on a mattress or a blanket would take approximately two hours to cause a fire and the fire at Plaintiff's residence did not start within two hours of the time Plaintiff said that he went to bed and may have smoked the cigarette. Mr. Shouman found elongated burn patterns that

indicated the use of flammable accelerants. *See* JT Ex. 8, 00061 (illustrating areas where accelerants appear to have been poured). Like Captain Johnson, Mr. Shouman also concluded that there were multiple points of origin for the fire. Through the use of the process of elimination, Mr. Shouman found that there was no explanation for the fire other than that it was incendiary.

23. Mr. Shouman independently investigated the fire scene and therefore did not rely on the conclusions or samples of others in arriving at his determination.

24. Rex Millard appeared as the Plaintiff's cause and origin expert. Defendant stipulated to Mr. Millard's qualifications as an expert. Mr. Millard did not visit the fire scene, but rather conducted his investigation by reviewing the available documentation.

25. Mr. Millard concluded that the fire's origin was undetermined because there were natural explanations for all that occurred in the fire and there was insufficient documentation to evaluate the fire's origin. Mr. Millard considered only the physical evidence in reaching his conclusion; in other words, he did not take into account the Plaintiff's inquiry about whether his neighbors had fire insurance, the neighbors' reactions to the fire, or the facts that Plaintiff was in a desperate financial situation and chose to walk to a payphone to report the fire rather than have his neighbor call the fire department.

26. Mr. Millard stated that he would have conducted the investigation differently, but would not say that Captain Solem's or Mr. Shouman's investigations were poorly conducted.

27. Mr. Millard admitted that the best evidence was that which could be viewed and collected at the scene and that not having visited the scene placed him at a disadvantage. Mr. Millard also admitted that he had found evidence neither proving that the fire originated

from natural or accidental causes nor disproving that the fire was incendiary. Mr. Millard essentially agreed that a cigarette could not have started the fire.

28. Although Mr. Millard did not agree with Mr. Shouman's and Captain Solem's conclusion that the fire had multiple points of origin, he agreed that nothing in the physical evidence was inconsistent with the fire's having multiple points or origin.

29. Mr. Millard confirmed that negative test results did not necessarily rule out the use of liquid accelerants and stated that he knew of fires that were classified as incendiary despite no accelerant having been found. The court therefore finds that Mr. Millard's testimony does not preclude a finding that the fire was incendiary.

30. The court finds that Mr. Millard's not visiting the site placed him at a considerable disadvantage. His testimony that the fire's cause could not be determined is outweighed by the testimony of four witnesses, namely, Captain Johnson, Captain Solem, Mr. Ball, and Mr. Shouman, all of whom were present at the site and found the circumstances surrounding the origin of the fire suspicious. In particular, the court was persuaded by the fact that Captain Solem independently corroborated Mr. Shouman's conclusions that the fire had multiple points of origin and was incendiary. For example, Mr. Shouman determined that that "unusually rapid communication" between the lower and upper levels was the result of the fire's having multiple points of origin. Similarly, Captain Solem determined that there was simultaneous burning of both the upstairs and downstairs of the residence, which meant that there had been multiple points of origin.

31. Although Mr. Shouman and Captain Solem admitted that elongated, linear patterns can be caused by things other than liquid accelerants, the court agrees with these experts that the lack of any another explanation for the

cause of the fire, coupled with the location of these unusual burn patterns along a natural walking path, and the simultaneous burning of both the upstairs and downstairs of the residence indicate not an accidental fire, but a fire with multiple points of origin and the use of a liquid accelerant to cause and spread the fire.

32. Mr. Millard admitted that, in light of his decades of experience as a fire investigator, the facts of Plaintiff's case struck him as suspicious.

33. The court also finds Plaintiff's actions, statements, and explanations before and after the fire suspicious. For instance, Plaintiff did not notify any of his neighbors of the fire. Plaintiff did not even ask to use any of his neighbors' phones to report the fire. Instead of walking the approximately fifteen feet to the Davenport's house or the less than 100 feet to Mr. Barnfield's house in order to use either of their phones (not to mention alert them to the fire), Plaintiff chose to casually walk approximately a 1/4 mile away to the nearest payphone. *See* JT Ex. 27, 6 (copy of Mr. Davenport's deposition describing distance from Plaintiff's house); *see also* JT Ex. 29, 8 (copy of Bill Barnfield's deposition describing distance from Plaintiff's house). When questioned as to why Plaintiff did not knock on his next door neighbor's door in order to use their telephone to report the fire rather than walk the 1/4 mile to the payphone, Plaintiff said that it was "quicker to walk." The court finds Plaintiff's answer and behavior highly suspicious.

34. Within the month preceding the fire, Plaintiff had a conversation with Peter Davenport, Plaintiff's neighbor, in which Plaintiff asked Mr. Davenport if he had fire insurance. Since then, Plaintiff has provided different explanations for why he asked the question. The court finds the initial asking of the question indicative of Plaintiff's intent to burn down his house and the lack of

a consistent explanation as to why he asked the question indicative of Plaintiff's hiding something.

35. Plaintiff also was dishonest about his prior convictions, failing to list his November 16, 1996 and April 29, 1997 shoplifting convictions in his response to the December 14, 1998 interrogatory. *See* JT Ex. 21, 2.

36. In addition, Plaintiff gave inconsistent testimony regarding his actions on the night of the fire. Mr. Shouman testified that Plaintiff, while reciting his version of the events on the night of the fire, suddenly realized that his version of the facts was illogical and quickly changed his story about the door from which he exited.

37. Overall, the court finds that these multiple examples of Plaintiff's evasiveness and dishonesty call into doubt Plaintiff's trustworthiness and credibility as a witness.

38. At the time of the fire, Plaintiff was financially stressed. Plaintiff's bank records show a balance of $1.50 on January 7, 1997 and of $.50 on February 28, 1997. *See* JT Ex. 45 (certified true copies of bank records). In addition, Plaintiff was two months behind on his mortgage payment, having missed the January and February payment dates, and knew that if he missed a third payment, the bank would foreclose on the mortgage. Plaintiff was not receiving rent, his usual source of income, because his last tenants had moved out in mid-January. The only prospective source of income Plaintiff apparently had was possible money from Plaintiff's mother who Plaintiff testified was planning to visit him on the 20th of February 1997.

39. Prior to the fire, the Plaintiff had a yard sale. The court finds that this fact, taken together with all the other information regarding Plaintiff's financial circumstances, further suggests that Plaintiff was in dire financial straights at the time of the fire.

40. At the time of the fire, Plaintiff's house also was for sale. Plaintiff testified that he spoke with his realtor a few days prior to the fire and agreed orally to lower the sale price from $210,000 to $199,000 because he wanted to sell the house and was concerned that his realtor had not been showing the property. *See* JT Ex. 33 (listing agreement(s) and correspondence between realtors and Plaintiff); JT Ex. 46 (same). The court finds that this fact, taken together with all the other information regarding Plaintiff's financial circumstances, further suggest that Plaintiff was in dire financial straights at the time of the fire.

41. At the time of the fire, Plaintiff was the sole owner of the house and the named insured on the insurance policy. *See* JT Ex. 37A (copy of insurance policy); Def.'s Jan. 20, 1999 Memo, 1.

42. Due to his dire financial condition, Plaintiff had motive to set the fire in order to obtain the insurance proceeds.

43. Mr. Millar agreed that Plaintiff's financial situation was such that he had motive to set his house on fire.

44. As Plaintiff testified, he knew that if his house burnt down the insurance company would pay to have the house rebuilt and would pay the mortgage "for awhile." *See also* JT Ex. 20, 105 ¶2-8 (Plaintiff stated under oath that after his house burnt down in 1982, the insurance company paid his mortgage while the house was being rebuilt). The court finds that the Plaintiff had knowledge all of the benefits and proceeds he could expect from the insurance policy should his house burn down.

45. Mr. Millard stated that gasoline is commonly used to start liquid accelerant fires. A gasoline can, which was approximately half full, was found at the site.

46. The court disbelieves Plaintiff's testimony regarding the presence of the gasoline and the gas can at the site.

Plaintiff testified that he filled the gasoline can when he bought the gas, closed the container, but then spilled some gasoline while he rode his bike home and then placed some in the lawnmower. Hence the gasoline can was found only partially full. Mr. Davenport testified that he could not recall ever having seen Plaintiff mow his lawn in the four to five years prior to the fire that he had been living next door to Plaintiff. Plaintiff admitted at trial that his lawn "was a jungle" and had not been mowed in at least one year. Because Plaintiff could not provide a plausible explanation for the presence of the half-empty gasoline can at the site, the court finds that the gasoline from the can was used by Plaintiff to start the fire.

47. In the evening of February 13, 1997, Plaintiff returned to his residence where he remained alone with all of the doors leading to the exterior locked from the inside. From this fact, the court concludes that no one else could have started the fire.

48. The presence of the gasoline at the site, coupled with the fact that Plaintiff was home alone, establish by clear and convincing evidence that Plaintiff had opportunity to start the fire.

49. Thus, the court finds that Plaintiff, who had motive, knowledge, and opportunity, did in fact start the fire for purposes of obtaining the insurance proceeds.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the action pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

2. Under the applicable State Farm Homeowners Extra Policy, accidental losses are covered However, the policy is void if any person insured under the policy causes a loss to the property for the purpose of obtaining insurance benefits OR intentionally conceals or

misrepresents, before or after the fire, any material fact or circumstance relating to the insurance.

3. The testimony of Defendant's witnesses clearly and unambiguously established that this was an incendiary fire. Hence, Plaintiff failed to sustain his burden of proof as to the accidental nature of the fire as required by the insurance policy.

4. Defendant has proven by a preponderance of the evidence and by clear and convincing evidence not only that Plaintiff intentionally concealed and misrepresented material facts and circumstances relating to his claim of insurance benefits, but also caused the fire in order to obtain insurance benefits. For both of these reasons, the policy is void.

5. Because the policy was void, it was reasonable for the Defendant to deny coverage for the fire and refuse to pay Plaintiff the related insurance benefits.

6. Defendant did not breach its insurance contract with Plaintiff.

7. Even if all burdens of proof in this case rested on the Defendant, it carried these burdens of proof in establishing by clear and convincing evidence the incendiary nature of the fire and that Plaintiff was the cause of the fire.

CONCLUSION

Any findings of fact which should more properly be deemed conclusions of law and any conclusions of law which should more properly be deemed findings of fact shall be so construed.

Pursuant to its findings and conclusions contained herein, the court hereby ORDERS that judgment be entered in favor of Defendant on all claims.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 26, 2001

/s/ DAVID ALAN EZRA
DAVID ALAN EZRA
CHIEF UNITED STATE DISTRICT JUDGE

APPENDIX B

UNITED STATES CONSTITUTION

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 6(b)

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in it discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 38(b)

Rule 38. Jury Trial of Right

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2)

filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

Rule 38(d)

Rule 38. Jury Trial of Right

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39(b)

Rule 39. Trial by Jury or by the Court

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Rule 81(c)

Rule 81. Applicability in General

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be

accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

(2)

No. 03-1463

Supreme Court, U.S.
FILED
MAY 2 1 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARTIN HOOD,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Has Petitioner forfeited all rights to appeal the striking of his untimely jury demand because he never objected to the magistrate's order striking the jury demand and thus never raised the issue before the district judge?

(2) Where Petitioner gives no reason for his untimely jury demand and the only reason is his inadvertence, may the Ninth Circuit Court of Appeals properly apply Rule 39(b) of the Federal Rules of Civil Procedure such that relief cannot be granted?

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Martin Hood

Respondent is State Farm Fire And Casualty Company

CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Fire And Casualty Company ("Respondent") is a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company ("State Farm Auto"). State Farm Auto is a mutual insurance company having no stock of any kind and no publicly traded stock.

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OPINIONS AND ORDERS BELOW

On June 8, 1999, the magistrate granted Respondent's motion to strike Petitioner's untimely jury demand. The action proceeded to bench trial, and on November 26, 2001, the district judge issued unpublished Findings Of Fact And Conclusions Of Law in favor of Respondent, ruling *inter alia* that Petitioner set fire to his home for purposes of obtaining insurance proceeds, intentionally concealed and misrepresented material facts related to his claim for insurance benefits, and that his insurance policy was thus void.

Petitioner appealed to the Ninth Circuit Court of Appeals on the sole issue of whether he was entitled to a jury trial. On December 5, 2003, the Ninth Circuit issued an unpublished Memorandum affirming the lower court. Subsequently, on January 23, 2004, the Ninth Circuit also issued an unpublished Order denying Petitioner's Petition for Rehearing En Banc.

All of these opinions and orders are attached to the Petition For A Writ Of Certiorari in Appendix A.

JURISDICTION

The Petition For Rehearing En Banc was denied by the Ninth Circuit Court of Appeals on January 23, 2004. The petition for a writ of certiorari was filed on April 19, 2004. Jurisdiction in this case is based on 28 U.S.C. § 1254.

REGULATORY PROVISIONS INVOLVED

Federal Rules

Rule 72(a) of the Federal Rules of Civil Procedure

Rule 72. Magistrate Judges; Pretrial Orders

(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Rule 81(c) of the Federal Rules of Civil Procedure

Rule 81. Applicability in General

* * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20

days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

Rule 39(b) of the Federal Rules of Civil Procedure

Rule 39. Trial by Jury or by the Court

* * *

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of

a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Hawaii Rules

Rule 38 of the Hawaii Rules of Civil Procedure (1999)

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. Where by statute a jury trial is allowed on appeal to the circuit court from the prior determination of any court or administrative body, a trial by jury may be had if demanded in the notice of appeal, and if not demanded in the notice, the appellee may have a trial by jury by filing a demand within 10 days after the case is docketed in the circuit court.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand

for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

COUNTER-STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

Federal jurisdiction is proper based on subject matter jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship). The action was initiated in state court between non-diverse parties (Petitioner and a defendant State Farm adjuster were both residents of Hawaii). However, after the adjuster was dismissed, the action was timely removed by Respondent to federal court. Petitioner was at all relevant times a resident of Hawaii and Respondent is a business organized and existing under the laws of the State of Illinois with its principal place of business in Bloomington, Illinois.

B. Material Facts

The facts relevant to the petition relate to Petitioner's untimely demand for jury trial and his failure to object to the magistrate's order striking his jury demand.

Petitioner brought the action in state court, filing the Complaint on February 13, 1998 and the First Amended Complaint on February 20, 1998 against Respondent and

its adjuster, Jeff Ball ("Ball"). On April 27, 1998, Respondent and Ball each filed their respective Answer to First Amended Complaint. These were the last pleadings filed. *While this case was in the state court, Petitioner never filed a demand for jury trial.*

After Ball was granted summary judgment and dismissed from the case, Respondent filed a Notice of Removal to the U.S. District Court on January 13, 1999. On January 14, 1999, Respondent filed and served Petitioner with its Notice of Filing Notice of Removal.

On February 19, 1999, more than a year after initiating the action and thirty-six (36) days after the Notice of Removal was served, Petitioner filed an untimely Demand For Trial By Jury without seeking leave of court to do so. On April 20, 1999, Respondent filed a Motion To Strike Jury Demand, asserting that Petitioner's demand for jury trial was untimely under FRCP 81(c) and that Petitioner had thus waived his right to jury trial.

On May 3, 1999, Petitioner filed a two-page Memorandum In Opposition to the Motion To Strike, which *did not provide any explanation why his jury demand was late.*

On June 8, 1999, the magistrate judge granted Respondent's Motion To Strike Jury Demand on the grounds that Petitioner's demand for jury trial was untimely under FRCP 81(c), such that Petitioner had waived trial by jury, and the court had no discretion to order a jury trial under FRCP 39(b). Importantly, *Petitioner never objected to the magistrate's order, nor did he seek any review by the district judge.* Rather, without any objection from Petitioner, the case proceeded to a bench trial which commenced before the district judge in September 2001 – more than two years after the magistrate had struck

Petitioner's jury demand. Only after the district judge ruled against Petitioner did he raise the issue, on appeal to the Ninth Circuit, that the magistrate improperly struck his late jury demand.

The Ninth Circuit Court, in turn, affirmed the striking of Petitioner's late jury demand, and also denied Petitioner's request for a rehearing en banc.

REASONS THE PETITION SHOULD BE DENIED

A. Summary of Arguments

First, Petitioner has forfeited any right to appeal the magistrate's order striking his untimely jury demand. Under FRCP 72(a), Petitioner had ten days to object to the magistrate's order and seek review by the district judge. Since he did not so object, he waived his right to appellate review of the magistrate's order. Petitioner also did not properly invoke FRCP 39(b) in the first instance because he never brought a motion seeking relief from his untimely jury demand, as required by the rule.

Second, even if this Court were to consider the merits of the Petition, there is no compelling reason to grant review of this matter. On several occasions, this Court has already denied review of Ninth Circuit cases addressing this same issue. Indeed, when addressing circumstances where there is no explanation for a late jury demand, Ninth Circuit law is not inconsistent with the other circuits which also typically deny relief. Further, Ninth Circuit law is consistent with decisions by this Court which affirm that a party can waive a constitutional right

if they do not meet requirements for properly asserting those rights.

B. Petitioner Has Forfeited Any Appeal Regarding His Untimely Jury Demand

(1) Petitioner Failed To Object To The Magistrate's Ruling

Under FRCP 72(a), in order to preserve his right to appeal the issue, Petitioner was required to object within ten days of receiving the magistrate's order striking his jury demand. The rule states, in pertinent part:

> **Magistrate Judges; Pretrial Orders**
>
> **(a) Nondispositive Matters.** A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. *Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. . . .*

Fed. R. Civ. Pro. 72(a) (emphasis added).

In *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996), the Ninth Court discussed the background of Rule 72(a) and the requirement that a party object to a magistrate's nondispositive order, or waive the issue for appeal.

> Enacted in 1983, Rule 72(a) provides that within ten days of being served with a copy of a magistrate judge's nondispositive order, a party may

> file objections to the order with the district judge to whom the case is assigned. *Since the 1991 amendment to Rule 72(a) became effective on December 1, 1991, the Rule has also explicitly prohibited an aggrieved party who fails to object within the ten-day period from later "assigning as error a defect in the magistrate judge's order."* Fed.R.Civ.P. 72(a). At least two other circuits have relied on Rule 72(a) in concluding that a magistrate judge's nondispositive order must have been reviewed by the district court in order to be appealable. *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993); *CNPqConselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter-Trade, Inc.*, 50 F.3d 56, 57 (D.C. Cir. 1995); *see Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1171-72 n.4 (D.C. Cir. 1995) (explaining *CNPq* and Rule 72(a)). We find these cases persuasive and conclude that a party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits its right to appellate review of that order.
>
> *Simpson*, 77 F.3d at 1173-74 (emphasis added).[1]

---

[1] The Ninth Circuit Court also noted that prior Ninth Circuit cases in this area, which had "not been entirely consistent", were decided *before* the 1991 amendment to Rule 72(a) and have therefore been superseded by the amended rule. *Simpson*, 77 F.3d at 1174 (comparing *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099 (9th Cir. 1985) and *United States v. Bogard*, 846 F.2d 563 (9th Cir. 1988), with *Palmer v. United States*, 794 F.2d 524 (9th Cir. 1986) and *McKeever v. Block*, 932 F.2d 795 (9th Cir. 1991)). As set out in *Simpson*, the *Dominator* and *Bogard* cases have been superseded by Rule 72(a)).

In addition to the cases from the First Circuit and the District of Columbia Circuit referenced in the *Simpson* decision, the Third Circuit and Tenth Circuit have also similarly ruled that a party forfeits its appeal as to a magistrate's nondispositive order where no objection is raised below. In *United Steelworkers of America, AFL-CIO v. New Jersey Zinc Co., Inc.*, 828 F.2d 1001 (3rd Cir. 1987), a magistrate granted a motion striking the plaintiff's *demand for jury trial*, and the plaintiff did not object to the district judge. The Third Circuit Court thus held the plaintiff had waived the issue for appeal, stating:

> We do not reach Steelworkers' contention that the magistrate erred because we conclude that Steelworkers failed to preserve that issue in that it filed no objections to the magistrate's ruling and never raised the issue before the district court either before or during the course of the bench trial.

Id. at 1004-1005.

Moreover, the Court raised the concern that allowing an appeal to go forward in this situation would be to condone unfair trial tactics.

> We cannot escape drawing the inference that Steelworkers, which never once suggested to the district court that it preferred a jury trial to the bench trial given it, wished to have two bites to the proverbial apple, and awaited that court's decision on the merits before raising the jury trial issue which it held in reserve for a possible appeal. We cannot condone such trial tactics.

Id. at 1008.

Likewise, in *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695 (10th Cir. 1998), the Tenth Circuit Court ruled the plaintiff was precluded from raising on appeal a magistrate's joinder of parties, where the plaintiff had failed to seek review with the district judge. The court explained that by not timely objecting to the district judge, a party "[strips] the district court of its function of effectively reviewing the magistrates' order" and "[frustrates] the policy behind the Magistrate's Act, i.e., to relieve courts of unnecessary work." *Frontier*, 136 F.3d at 706 (citing to *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1165 (10th Cir. 1986)).

> Frontier proceeded through trial without objecting to the magistrate's order, thereby allowing significant judicial resources to be expended on a trial in which Frontier contends inappropriate parties were joined. The text of Rule 72 and precedent preclude Frontier from now raising an objection to the magistrate's ruling allowing joinder. [Citations omitted].

Frontier, 136 F.3d at 706-707.

Here, Respondent's motion to strike Petitioner's untimely jury demand was a nondispositive motion decided by the magistrate. *See United Steelworkers of America, supra*; Rule 72(a); 28 U.S.C. § 636(b)(1)(A). Petitioner never objected to the magistrate's order, never brought the issue before the district judge, and instead waited until after the bench trial was completed and a ruling issued by the district judge in favor of Respondent, before raising the jury trial issue for the first time during the appeal process. Petitioner has waived the issue and cannot seek review from this Court. *See* Rule 72(a); *Simpson*, *supra*; *United Steelworkers of America*, *supra*; *Frontier*, *supra*;

Pagano v. Frank, 983 F.2d 343, 346 (1st Cir. 1993).[2] Hence, the Petition should be rejected on these grounds.

(2) Petitioner Failed To Properly Invoke Rule 39(b)

Rule 39(b) requires that a motion be brought to seek the court's relief from an untimely jury demand:

> **(b) By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion *upon motion* may order a trial by a jury of any or all issues. (Emphasis added).

Petitioner's premise – that the magistrate should have exercised discretion in considering whether to strike the untimely jury demand – was never properly invoked because Petitioner did not bring a motion seeking such relief. Rather, Petitioner simply filed the late jury demand

[2] A case cited by Petitioner provides further support for Respondent's position that failure to preserve the issue precludes a later appeal. In *Malbon v. Pennsylvania Millers Mutual Insurance Company*, 636 F.2d 936 (4th Cir. 1980), the Fourth Circuit Court refused to consider the appellants' argument that the lower court had "completely abdicated its duty to exercise its discretion." 636 F.2d at 940. Because the appellants had failed to challenge the striking of their late jury demand *on these particular grounds*, the issue was not preserved for appeal. Likewise, in this case, Petitioner did not assert to the magistrate that the Ninth Circuit law regarding Rule 39(b) was incorrect. The issue has not been preserved for appeal in this case.

without leave of court. For this additional reason, Petitioner failed to preserve his rights for the instant Petition.

C. There Is No Compelling Reason To Grant Review

(1) This Court Has Previously Denied Review of This Issue

On at least four previous occasions, this Court has denied requests to review cases where the Ninth Circuit's application of Rule 39(b) in similar circumstances was in issue. *Pacific Fisheries Corp. v. H.I.H. Casualty & General Insurance, Ltd.*, 239 F.3d 1000 (9th Cir. 2001), *cert. denied*, 534 U.S. 944, 122 S.Ct. 324 (2001); *Kletzelman v. Capistrano Unified School Dist.*, 70 F.3d 1279 (9th Cir. 1995) (Table), *cert. denied*, 517 U.S. 1191, 116 S.Ct. 1681 (1996), *redesignated as Opinion*, 91 F.3d 68 (9th Cir. 1996); *Craig v. Atlantic Richfield Co.*, 19 F.3d 472 (9th Cir. 1994), *cert. denied*, 513 U.S. 875, 115 S.Ct. 203 (1994); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183 (1985).

In the most recent case of *Pacific Fisheries*, the Ninth Circuit affirmed the district court's denial of the plaintiff's untimely jury demand, which was due to attorney inadvertence or oversight. Relying on prior case law in the circuit, the Ninth Circuit Court ruled that "[a]n untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown." 239 F.3d at 1002. The plaintiff's petition for a writ of certiorari to this Court was denied, 534 U.S. 944, 122 S.Ct. 324 (2001), just as prior similar petitions from the Ninth Circuit had been denied. *See Craig*, *supra* (petition for writ of certiorari denied where Ninth Circuit held that trial court could not grant

relief under Rule 39(b) when failure to make timely jury demand resulted from oversight or inadvertence); *Kletzelman, supra*; and *Blau, supra*.

(2) Ninth Circuit Law Is Consistent With Other Circuits

Petitioner does not dispute that his demand for a jury trial was late, or that he never provided a reason for the untimely demand. Rather, Petitioner takes issue with the long-standing Ninth Circuit rule that, *in circumstances where no reason is given or the only reason is inadvertence*, the district court has no discretion to grant relief under Rule 39(b). *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002); *Pacific Fisheries, supra*; *Russ v. Standard Ins. Co.*, 120 F.3d 988, 989 (9th Cir. 1997); *Kletzelman, supra*; *Craig, supra*; *Blau, supra*; *Lewis v. Time Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983); *Wall v. National Railroad Passenger Corp.*, 718 F.2d 906 (9th Cir. 1983); *Beckham v. Safeco Insurance Company of America*, 691 F.2d 898 (9th Cir. 1982); *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-988 (9th Cir. 1980); *Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976). Although the Ninth Circuit rule may be stated more narrowly, it is consistent with most other jurisdictions which typically do not provide relief in these circumstances.

Although applying varying tests or rules regarding Rule 39(b), the Second, Third, Fifth, Sixth, Eight, Tenth, Eleventh, and D.C. Circuits have each expressed that inadvertence is not a favorable ground for allowing an untimely demand for jury trial. *See Noonan v. Cunard Steamship Co.*, 375 F.2d 69 (2nd Cir. 1967); *Galella v.*

Onassis, 487 F.2d 986 (2nd Cir. 1973); *United States Securities and Exchange Commission v. Infinity Group Co.*, 212 F.3d 180, 195 (3rd Cir. 2000), *cert. denied*, 532 U.S. 905, 121 S.Ct. 1228 (2001); *Farias v. Bexar County Board of Trustees For Mental Health Mental Retardation Services*, 925 F.2d 866 (5th Cir. 1991), *reh'g denied*, 931 F.2d 892 (5th Cir. 1991), *cert. denied*, 502 U.S. 866, 112 S.Ct. 193 (1991) (noting a long line of Fifth Circuit cases which recognize that a district judge properly denies an untimely jury demand when the failure to make a timely demand results from mere inadvertence); *O'Malley v. United States Fidelity and Guaranty Co.*, 776 F.2d 494, 502 (5th Cir. 1985); *Rhodes v. Amarillo Hospital District*, 654 F.2d 1148 (5th Cir. 1981); *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987); *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342 (1980); *Nissan Motor Corp. in U.S.A. v. Burciaga*, 982 F.2d 408 (10th Cir. 1992); *Parrot v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344 (1983); *BCCI Holdings v. Khalil*, 214 F.3d 168 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 958, 121 S.Ct. 382 (2000). Moreover, numerous district courts around the country have made similar rulings. *See*, Annotation, *Discretion of District Court Under Rule 39(b) Of Federal Rules of Civil Procedure, Authorizing It To Order Jury Trial Notwithstanding Party's Failure To Make Seasonable Demand For Jury*, 6 ALR Fed. 217 at § 7 (1971) ("[m]ost of the cases, but not all, agree that mere oversight or the like on the part of counsel in failing to make a timely jury demand is an insufficient ground for granting a belated motion for trial by jury under Rule 39(b).").

The cases cited by Petitioner do not support his assertion that, if this action were filed in any circuit other than the Ninth Circuit or Second Circuit, "it is likely that the district court would have granted a request under Rule 39(b) for a jury trial." *See* Petition at p. 4. Rather, most of the cases cited by Petitioner either do not deal with circumstances where mere oversight or inadvertence are involved – such as *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987) (pro se plaintiff) and *Members v. Paige*, 140 F.3d 699 (7th Cir. 1998) – or, similar to the Ninth Circuit, the cases actually *deny* relief when the reason for the untimely demand is inadvertence. *See Infinity Group Co.*, 212 F.3d at 195 ("Courts in this Circuit generally deny relief when 'the only basis for such relief advanced by the requesting party is the inadvertence or oversight of counsel.'"); *Kitchen*, *supra*; *Littlefield*, *supra*; *Nissan Motor Corp.*, *supra*; *BCCI Holdings*, *supra*.[3]

(3) Ninth Circuit Law Is Consistent With Constitutional Requirements And U.S. Supreme Court Rulings

Finally, the Ninth Circuit law related to Rule 39(b) is consistent with constitutional requirements and rulings of this Court. In *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979), this Court fully recognized that

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[3] Petitioner's reliance on *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2nd Cir. 1983) is likewise unavailing and distinguishable. Unlike in *Cascone*, where the court stated "there was more than mere inadvertence here," 702 F.2d at 393, there is nothing in this case record to suggest that Petitioner's counsel was unfamiliar with or new to federal court practice.

procedural devices affecting the right to a jury trial did not impinge on Seventh Amendment rights. Addressing whether collateral estoppel could preclude the petitioner from having a jury trial on issues previously decided in a nonjury case, the Court held that estoppel did not violate the Seventh Amendment. The Court further noted that:

> [M]any procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. *See Galloway v. United States*, 319 U.S. 372, 388-393, 63 S.Ct. 1077, 1086-1088, 87 L.Ed. 1458 (directed verdict does not violate the Seventh Amendment); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-498, 51 S.Ct. 513-514, 75 L.Ed. 1188 (retrial limited to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-321, 23 S.Ct. 120, 121-122, 47 L.Ed. 194 (summary judgment does not violate the Seventh Amendment).

439 U.S. at 336, 99 S.Ct. at 654.

Quoting from the *Galloway* case, the Court further stated:

> "The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." 319

U.S., at 390, 392, 63 S.Ct., at 1087 (footnote omitted).

439 U.S. at 337, 99 S.Ct. at 654.

See also, *United States v. Moore*, 340 U.S. 616, 71 S.Ct. 524 (1951) (where no demand for jury trial was made, any right to jury trial was waived under Rule 38).

In *Wilson v. Corning Glass Works*, 195 F.2d 825 (9th Cir. 1952), the Ninth Circuit held that there was no constitutional infirmity where plaintiff's motion for jury trial under Rule 39(b) was denied since no reason for the late demand was given. In reaching its decision, the court emphasized that, in considering the constitutional dimensions of the right to jury trial, *a party may be required to timely assert a constitutional right in order to preserve it. Id.* at 828, *citing Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 677 (1944); *Capital Traction Co. v. Hof*, 174 U.S. 1, 23, 19 S.Ct. 580, 589 (1899) (Seventh Amendment "does not prescribe . . . what conditions may be imposed upon the demand of such a [jury] trial, consistently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several states are entitled to great weight. . . . "); *Kass v. Baskin*, 164 F.2d 513, 514 (5th Cir. 1947).

The Ninth Circuit law is within constitutional limits and is consistent with the rulings of this Court that a party can be required to assert their constitutional rights in a timely manner in order to preserve them.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 1 - 2004
OFFICE OF THE CLERK

(3)

No. 03-1463

IN THE

Supreme Court of the United States

MARTIN HOOD,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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June 1, 2004

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

1. **There is a conflict among the courts of appeals.** Respondent correctly points out that where district courts are given discretion to decide a particular issue, and hundreds of opportunities to exercise that discretion are presented, the decisions will vary. Respondent also correctly asserts that, under Rule 39(b), inadvertence as the sole cause of an untimely filing is a negative factor. However, respondent cannot deny, if a district court decides, where inadvertence was the sole reason for a failure to file on time, that a jury trial should nevertheless be granted because the delay was short, the date of trial distant, and there was no inconvenience to the court or harm to the other party, that its decision would be affirmed upon appeal in every circuit except the Ninth and possibly the Second, and that it would be reversed in the Ninth Circuit. The question presented by the petition is whether one clear and unambiguous interpretation of Rule 39(b) should exist in the Ninth Circuit and a different clear and unambiguous interpretation should be followed in all the other circuits.

2. **The question presented by the petition is properly before this Court.** Respondent correctly asserts that a jury trial was denied by a magistrate and that no objections were filed, so the decision was not reviewed by the district court judge. Respondent incorrectly contends that this constituted a waiver by the petitioner of his right to appeal. The Magistrates Act provides, in 28 U.S.C. § 636(b)(1)(A) that where non-dispositive matters are involved, a district court judge may reconsider a magistrate's determination only "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." An honest objection in

this action would have had to state that the magistrate's decision was in accordance with law because it was required by a long, consistent line of decisions of the Court of Appeals. Failure to file a plainly futile objection does not constitute a waiver.

Moreover, if there were a waiver, it would be excused. Respondent made this same argument before the Court of Appeals, which ignored it and affirmed on the merits. *See Oklahoma City* v. *Tuttle*, 471 U.S. 800, 815-16 (1985) (Court reached merits despite party's failure to object to jury instruction because Court of Appeals overlooked the default); *Ulster County Court* v. *Allen*, 442 U.S. 140, 149 (1979); *On Lee* v. *United States*, 343 U.S. 747, 750 n.3 (1952).[1/]

Petitioner knew, when he filed an appeal to the Court of Appeals, that he had no chance of reversal by the three-judge panel. Such panels do not overrule decisions made by other panels of the same court, and certainly not a line of consistent decisions made by other panels.[2/] Petitioner's only hope was the slim chance of a grant of a petition for rehearing en banc. It now appears that this will never happen. The only way that the court below can be brought into harmony with the courts of appeals throughout the country is by action by this Court. That would require probably only a small expenditure of effort by the Court and little or no dissent within it.

[1/] Respondent also contends that the magistrate's denial of a jury trial was not made on motion, as required by Rule 39(b). But it was made in response to a motion by respondent and, in any event, Rule 39(b) is satisfied if a party files a motion "or some similar manifestation of that party's desire to have a jury trial." Wright and Miller, FEDERAL PRACTICE AND PROCEDURE Civil § 2334 (3d ed. 2002); *see also* MOORE'S FEDERAL PRACTICE, ¶ 39.08 (2d ed. 1996) ("any written notification of the party's desire for a jury, such as an untimely demand, may be treated as a Rule 39(b) motion").

[2/] *United States* v. *Hayes*, 231 F.3d 1132, 1139-40 (9th Cir. 2000).

CONCLUSION

The administration of our judicial system would be improved, and made more fair, if a literal interpretation of Rule 39(b) were to be applied throughout the United States rather than in most of the circuits. The petition should be granted and the existing conflict resolved.

Respectfully submitted,

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